

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

KENNETH SMITH,

Petitioner,

Case Number: 4:15-cv-11746

Hon. Linda V. Parker

v.

BONITA HOFFNER,

Respondent.

**OPINION AND ORDER TRANSFERRING CASE TO
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

Petitioner Kenneth Smith (“Petitioner” or “Smith”), a Michigan state prisoner, has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the Court determines that this is a successive habeas corpus petition and, therefore, orders it transferred to the United States Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1631¹ and 28 U.S.C. § 2244(b)(3)(A).

¹ 28 U.S.C. § 1631 provides, in relevant part:

Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed . . .

Smith challenges his 1990 convictions for first-degree murder, Mich. Comp. Laws § 750.316, two counts of assault with intent to do great bodily harm less than murder, Mich. Comp. Laws § 750.84, one count of armed robbery, Mich. Comp. Laws § 750.529, and three counts of possession of a firearm during the commission of a felony, Mich. Comp. Laws § 750.227b. In 1996, Smith filed a habeas corpus petition in the United States District Court for the Western District of Michigan challenging the same convictions challenged in this petition. The petition was denied on the merits. *See* 11/26/97 Opinion and Order, *Smith v. Withrow*, No. 4:96-cv-00184, dkt. # 36 (Enslin, J.). The Court certified for appeal Smith's ineffective assistance of counsel claim. *See id.* The Sixth Circuit Court of Appeals, after certifying four additional claims for appellate review, affirmed the district court's denial of Smith's habeas corpus petition. *Smith v. Withrow*, No. 97-2319, 1999 WL 503473 (6th Cir. July 6, 1999).

Before a prisoner may file a habeas petition challenging a conviction already challenged in a prior habeas petition, the prisoner must "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). Smith's prior habeas petition was dismissed on the merits. Smith has not obtained from the Court of Appeals for the Sixth Circuit authorization to file a successive petition in this court. When a

second or successive petition for habeas corpus relief is filed in the district court without prior authorization, the district court must transfer the petition to the Court of Appeals pursuant to 28 U.S.C. § 1631. *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997).

Accordingly, the Court **ORDERS** the District Court Clerk to transfer this case to the United States Court of Appeals for the Sixth Circuit.

SO ORDERED.

S/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: July 12, 2016

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, July 12, 2016, by electronic and/or U.S. First Class mail.

S/ Kelly Winslow for Richard Loury
Case Manager